Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

PHYLLIS G. KYLE,

Petitioner,

v.

CAMPBELL SOUP COMPANY,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May a District Court apply the excusable neglect standard of Federal Rule of Civil Procedure 6(b) and grant a two-day extension of time to file a post-judgment request for attorney's fees in a Title VII action when the successful plaintiff, acting in good faith and without prejudice to the opposing party or the interests of efficient judicial administration, mistakingly interprets a confusing Local Rule and adds three days to her calculation of time?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

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PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

The published decision of the United States Court of Appeals for the Ninth Circuit, as amended upon denial of Petition for Rehearing, is reproduced as Appendix (App.) A. The original decision of the United States Court of Appeal for the Ninth Circuit, prior to amendment after Petition for Rehearing, is reproduced as Appendix B. The unpublished decision of the United States District Court for the Eastern District of California is reproduced as Appendix C.

STATEMENT OF JURISDICTION

The original opinion of the Ninth Circuit Court of Appeals was filed on January 4, 1994. Petitioner filed a timely Petition for Rehearing on January 14, 1994, which was denied by the Ninth Circuit in its Order and Amended Opinion filed on April 8, 1994. App. A-3. This Petition for Writ of Certiorari has been timely filed in accordance with Rule 13.1 of the United States Supreme Court Rules. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The federal statutory provision at issue in this case is the attorney's fee provision of Title VII contained in 42 U.S.C. §2000e-5(k), which provides, in pertinent part, as follows:

> "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, ... a reasonable attorney's fee as part of the costs ..."

This case deals principally with interpretation of two Local Rules of the United States District Court for the Eastern District of California, Rules 293(a) and 136(a), which read as follows:

"

RULE 293
AWARDS OF STATUTORY ATTORNEY'S FEES

(a): Time for application. Motions for awards of attorneys' fees to prevailing parties pursuant to statute shall be filed not later than thirty (30) days after entry of final judgment. Such motions are not governed by Fed. R. Civ. P. 59(e) or by L.R. 292, but are governed by L.R. 230. See also L.R. 136." (emphasis in original).

"

RULE 136
CALCULATION OF TIME PERIODS

(a) Additional Time After Service by Mail. The time period fixed by these Local Rules shall be subject to the provisions of Fed. R. Civ. P. 6(e) or Fed. R. Crim. P. 45(e), allowing additional time to do some act or take some proceeding within a prescribed period after service of a notice or other paper on the party by mail. Whenever in these Local Rules a different time period is prescribed for an act depending on whether service is in person or by mail, the Rule shall be deemed to include the time period prescribed in Fed. R. Civ. P. 6(e) and Fed. R. Crim. P. 45(e), and no additional time shall be allowed for service by mail."

In addition, the case concerns Federal Rules of Civil Procedure 6(b) and 6(e), which read, in pertinent part, as follows:

"**(b) Enlargement.** When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may ... (2) upon motion made after expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect...."

(e) **Additional Time After Service by Mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of the notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period."

STATEMENT OF THE CASE

This case involves the discretion of District Court judges to find that their own Local Rules are confusing and, consistent with the guidance provided by the Court in the recent case of *Pioneer Investment Services v. Brunswick Associates Limited Partnership,* 113 S.Ct. 1489 (1993), to find excusable neglect when an attorney incorrectly interprets such an admittedly confusing Local Rule of Court and adds three additional days to his time calculation for filing a post-judgment motion for an award of attorney's fees in a Title VII action.

PHYLLIS KYLE was hired at CAMPBELL SOUP in June, 1970. RT I, 172:24-173:3.[1] At all times relevant to her claims in this case, PHYLLIS KYLE was employed as an AA Filler/Closer Mechanic. RT I, 173:4-10. PHYLLIS KYLE was the only female mechanic at CAMPBELL SOUP's Sacramento facility. RT I, 242:16-17.

Employees at CAMPBELL SOUP served on four separate shifts, shifts 1 through 3 corresponding, respectively, to the customarily referred to day shift, swing shift and night shift. The fourth shift was a day shift that worked weekends with usually Tuesdays and Wednesdays off. RT I, 174:22-25, 175:1-6. During the majority of her employment with CAMPBELL SOUP, PHYLLIS KYLE worked on the second or swing shift. RT I, 174:13-18. PHYLLIS KYLE transferred from the second shift to the first shift in March, 1986. RT I, 181:21-25.

PHYLLIS KYLE's principal claim in this action concerned this transfer to the first shift and her underlying reason for seeking the transfer - to obtain in-depth overhaul experience that had been performed by a former AA Filler/Closer Mechanic, Jack Bosley, on the first shift. ER, CR 34, 2:9-14. This type of in-depth overhaul experience was necessary to enhance PHYLLIS KYLE's career and ultimate promotion to lead mechanic. ER, CR 95, 2:15-3:1. As an adjunct to this claim, PHYLLIS KYLE alleged, also,

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[1] References to the Reporter's Transcripts in the United States District Court for the Eastern District of California are designated "RT", followed by the volume, page and line number. References to the Excerpts of Record filed with the Ninth Circuit Court of Appeal are designated "ER", followed by the Clerk's Record reference number "CR xx", page and line number.

that she was assigned more menial duties than similarly situated male mechanics.

To redress her grievances, PHYLLIS KYLE sought declaratory and injunctive relief for gender-based discrimination under Title VII, as well as damages under a pendent state claim[2]. The United States District Court had subject matter jurisdiction over PHYLLIS KYLE's federal Title VII claims pursuant to 42 U.S.C. §2000e-5(f) and 28 U.S.C. §1343 and pendent claim jurisdiction over her state claim.

After a bench trial, the District Court determined that the failure to assign to PHYLLIS KYLE the Bosley overhaul duties upon her transfer to first shift was discrimination based on her sex. The District Court further found that the assignment of other menial tasks by her supervisor, Mr. Rains, during the course of his supervision of her was also discrimination based on sex. In order to remedy these discriminatory actions, PHYLLIS KYLE was awarded declaratory relief, injunctive relief, compensatory damages under her pendent state claims, costs and attorney's fees.

On May 21, 1992, the District Court's judgment was entered and notice thereof was served on the parties by mail. App. A-5. After judgment was entered against CAMPBELL SOUP, PHYLLIS KYLE filed a post-trial motion for attorney's fees under the District Court's Local Rule 293, which required such motions to be filed within "30 days after entry of judgment", but which also directed Counsel to

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[2] Because this action pre-dated the Civil Rights Act of 1991, Ms. Kyle was not entitled to seek damages under Title VII directly. *Landgraf v. U.S.I. Film Products,* 114 S.Ct. 1483 (1994).

" See also LR [Local Rule] 136". Local Rule 136 allows for three (3) additional days to take action for time periods running from service of a notice by mail. PHYLLIS KYLE'S motion was filed 32 days after entry of judgment. *Id.*

After being informed that CAMPBELL SOUP intended to oppose her motion for attorney's fees, in part on the basis that it was not timely filed, PHYLLIS KYLE filed a motion for enlargement of time to file her attorney's fee motion on the basis of excusable neglect. The District Court, in interpreting its own Local Rules, determined that the three-day extension of Local Rule 136 did not apply to attorney fee motions under Local Rule 293. The District Court further determined, however, that PHYLLIS KYLE should be permitted to proceed with her attorney's fee motion, even though filed two days late, because: (1) it was the result of excusable neglect committed through a good-faith effort to comply with the Local Rules; (2) it resulted in no prejudice to CAMPBELL SOUP; and (3) if relief were not granted, PHYLLIS KYLE would forfeit an award of fees to which she was entitled. App. C-13. Most significantly, the District Court determined that the directive in Local Rule 293 to Local Rule 136 was confusing:

> ". . . I have to agree with you, it is confusing, and it is difficult, and it can be argued the other way. And I have to acknowledge that putting in the reference to Local Rule 136 tends to confuse rather than help maybe." App. C-7.

CAMPBELL SOUP appealed, in part claiming that the time enlargement was proscribed under the "bright line" approach followed by the First Circuit Court of Appeals in *Mattson v. Brown University,* 925 F.2d 529, 532 (1st Cir.

1991), which held that mistaken reliance on Federal Rule of Civil Procedure 6(e), which does not extend to a time period running from entry of judgment, "could not be excusable neglect". The Ninth Circuit agreed with CAMPBELL SOUP and held that "the district court abused its discretion by finding that mistaken reliance upon Rule 6(e) amounted to excusable neglect in this matter." App. B-11.

While the appeal was pending in the Ninth Circuit, the Court issued its opinion in *Pioneer*. Since the Ninth Circuit had not addressed the *Pioneer* decision in its original opinion, PHYLLIS KYLE filed a Petition for Rehearing based on the obvious inconsistency between the "bright line" decision by the Ninth Circuit and the Court's "equitable" analysis required by *Pioneer*.

Notwithstanding the Court's decision in *Pioneer*, the Ninth Circuit denied PHYLLIS KYLE's Petition for Rehearing and issued its Order and Amended Opinion, against which this Petition is directed. The Ninth Circuit refused to follow the equitable analysis required by *Pioneer* and attempted to distinguish *Pioneer* based upon the Court's reminder that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable neglect.'" App. A-10. In doing so, the Ninth Circuit ignored the District Court's determination that the directive in Local Rule 293 to "See also LR 136" tended to confuse rather than help, substituting its own finding that the Local Rules were not ambiguous. *Id.*

REASONS FOR GRANTING THE WRIT

On March 24, 1993, while this case was pending before the Ninth Circuit Court of Appeals, the Court issued

its decision in *Pioneer*, resolving a conflict in the Courts of Appeals regarding the meaning of the phrase "excusable neglect." The Court held that determination of excusable neglect "is at bottom an equitable one, taking into account of all relevant circumstances surrounding the party's omission." *Pioneer Investment Services v. Brunswick Associates, supra* at 1496.

Notwithstanding the decision in *Pioneer*, which rejected the "bright line" approach for excusable neglect followed by some Courts of Appeals, including the Ninth Circuit, the Ninth Circuit has refused to follow this equitable approach and has determined that "there is no basis for deviating from the general rule that a mistake of law does not constitute excusable neglect." App A-11.

Rule 10.1(c) lists among the considerations for review on certiorari the circumstance where "a United States Court of Appeal ... has decided a federal question in a way that conflicts with applicable decisions of this Court." United States Supreme Court Rule 10.1(c). Since this ground for review is present here, review by this Court is warranted.

I

THE NINTH CIRCUIT'S AMENDED OPINION CONFLICTS DIRECTLY WITH THE COURT'S OPINION IN *PIONEER INVESTMENT SERVICES v. BRUNSWICK ASSOCIATES* AND FAILS TO PROPERLY APPLY THE "EXCUSABLE NEGLECT" STANDARD ADOPTED BY THE COURT.

The meaning of "excusable neglect" had been a matter of some dispute in the federal courts until the Court

resolved the conflict in the Courts of Appeals in its recent decision in *Pioneer*[3].

In *Pioneer*, the Court affirmed the decision of the Court of Appeals for the Sixth Circuit, which had adopted a flexible approach in determining whether the neglect of a claimant and its counsel in ascertaining the bar date after which claims could be filed in a bankruptcy proceeding was excusable. In doing so, the Court rejected a more narrow view of "excusable neglect" previously followed by some Courts of Appeals, which required "a showing that the delay was caused by circumstances beyond the movant's control". *Pioneer, supra* at 1494, n.3.

The Court identified the appropriate test for excusable neglect as follows:

> "[In] determining what sorts of neglect will be considered 'excusable', we conclude that the determination is at bottom an equitable one, taking into account of all relevant circumstances surrounding the party's omission. These include . . . the danger of prejudice to the debtor, the length of the

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[3] *Pioneer* concerned interpretation of the provisions of Federal Rule of Bankruptcy Procedure 9006, which empowers the bankruptcy court to enlarge time and permit a late filing where the failure to comply is the result of excusable neglect. Rule 9006 was patterned after Federal Rule of Civil Procedure 6, which is at issue here and contains the same excusable neglect standard to enlarge time for late filings.

> delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Pioneer, supra* at 1498.

In *Pioneer* the Bankruptcy Court held that an attorney's indifference to a bar date for filing claims constituted inexcusable neglect, notwithstanding the fact that all other relevant factors favored allowing the late filing of the creditor's claim, because a ruling in favor of the creditor "would render nugatory the fixing of the bar date in this case". *Id.*

On appeal, the Court of Appeals for the Sixth Circuit reversed. The debtor then sought certiorari to the Court, which granted certiorari and ultimately affirmed the ruling of the Court of Appeals for the Sixth Circuit.

In its decision, the Court adopted the liberal approach to excusable neglect applied by the Sixth Circuit, as opposed to the more onerous approach applied by other circuits that limited excusable neglect to cases where the failure to act was due to circumstances beyond the moving party's control, and held that:

> "In this case, we are called upon to decide whether an attorney's inadvertent failure to file a proof of claim within the deadline set by the court can constitute 'excusable neglect' within the meaning of the rule [Bankruptcy Rule 9006(b)(1)]. Finding that it can we affirm." *Id.* at 1492.

In affirming the Court of Appeal's reversal of the Bankruptcy Court, the Court first concluded that the findings of the Bankruptcy Court concerning the issue of good faith, lack of prejudice to the debtor and lack of disruption in efficient judicial administration were unchallenged and "weigh strongly in favor of permitting the tardy claim". *Id.*

The Court then assessed the fourth factor, "culpability of respondents' counsel", and considered it "significant that the notice of the bar date provided by the Bankruptcy Court in this case was outside the ordinary course in bankruptcy cases ... [leaving] a "'dramatic ambiguity' in the notification." *Id.* at 1499-1500. Having analyzed all of the factors, the Court affirmed the Court of Appeal, noting that, while respondents' counsel had been remiss in failing to apprehend the notice, there were other factors that supported the conclusion that the Bankruptcy Court had abused its discretion in declining to find excusable neglect:

> "To be sure, were there any evidence of prejudice to petitioner or to judicial administration in this case, or any indication at all of bad faith, we could not say that the Bankruptcy Court abused its discretion in declining to find the neglect to be 'excusable'. In the absence of such a showing, however, we conclude that the unusual form of notice employed in this case requires a finding that the neglect of respondents' counsel was, under all the circumstances, 'excusable'". *Id.*

Thus, the Court rejected the "bright-line" approach to excusable neglect of the sort employed by the Ninth Circuit in its Amended Opinion below, *Id.* at 1498, n.14, in favor of a more flexible approach embodying an equitable

determination "taking account of all relevant circumstances surrounding the party's omission." *Id.*

Although the District Court below did not have the benefit of the Court's decision in *Pioneer* at the time it rendered its decision finding excusable neglect, the District Court did employ a balancing test that effectively encompassed the Court's *Pioneer* factors. Similar to the Bankruptcy Court in *Pioneer*, the District Court below determined that PHYLLIS KYLE's counsel had acted in good faith and that CAMPBELL SOUP would not be prejudiced by allowing a short, two-day, time enlargement[4]. App. C-13. Moreover, the District Court implicitly found that there would be no interference with judicial administration as a result of the two-day delay in filing the motion when it set forth its findings of excusable neglect:

> "The Court has determined that Plaintiff's action here amounts to excusable neglect. First, counsel's misapplication of Rule 6(e)'s three-day extension is not the kind of mistake that reflects professional incompetence. Instead, after reading the pertinent local and federal rules, the Court has concluded that Plaintiff made a good faith effort to comply with those rules. Second Defendant was not prejudiced by Plaintiff's neglect. As Plaintiff notes, hearing on the motion would not have been set for an earlier date had she filed her motion on time ... and Defendant had more

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[4] The short, two-day delay here is much less extensive then the 26-day delay found excusable in *Pioneer*.

than the required 31 days, in any event, to file a response." App. C-13.

Furthermore, the District Court, in keeping with *Pioneer's* requirement to consider all the relevant circumstances, also noted that its failure to grant relief to PHYLLIS KYLE would be in derogation of her right to collect statutory attorney fees as provided in Title VII. App. C-13. Indeed, attorney's fees are a significant component of the relief available under Title VII and constitute a significant incentive for private citizens to enforce its provisions. *Parker v. Califano,* 561 F.2d 320, 330 (D.C. Cir. 1977). The Court itself has even stressed the importance of attorney fee provisions in the civil rights arena under the similar attorney fee provisions for successful Title II litigants. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 401-02 (1968). This right to recoup attorney's fees after a Title VII plaintiff has prevailed at trial should not be forfeited in a situation where an attorney's delay in noticing a motion is insignificant and non-prejudicial to the opposing party and the court. Indeed, such a result would constitute a windfall to an employer found to have violated Title VII. CAMPBELL SOUP should not be entitled to such a windfall here, where all of the pertinent "excusable neglect" factors, properly weighed and supported by the District Court's findings below, strongly favor permitting PHYLLIS KYLE'S request for an enlargement of time.

Just as in *Pioneer*, the only factor weighing against a finding of excusable neglect was the culpability of counsel - here a failure to properly interpret the Local Rules. The District Court determined that Counsel's error was excusable because of the confusing nature of the reference in Local Rule 293 to Local Rule 136. Indeed, Local Rule 293 directs Counsel to "See Also LR 136". If, as the District Court and

Ninth Circuit both determined, Local Rule 136 does not apply to fee motions under Local Rule 293, this reference is total surplusage and, in the words of the District Court, tends "to confuse rather than help maybe." App. C-7. This confusing directive to Local Rule 136 contained within Local Rule 293 is nothing more than an invitation to error. Indeed, it would be simple enough for Local Rule 293 to admonish the reader that Local Rule 136 does not apply - just as it does with respect to Local Rule 292 ("Such motions are not governed by ... LR 292").

Ultimately, the District Court's conclusion that Local Rule 136 does not apply to attorney's fee motions necessarily renders meaningless Local Rule 293's admonition to "See also LR 136." Thus, its finding that Local Rule 293 "tends to confuse rather than help maybe", App. C-7, is a striking admission by the District Court that Rule 293 is confusing. The District Court's finding, therefore, that misinterpretation of this confusing rule can be excusable neglect, is fully consistent with the equitable analysis required by *Pioneer*.

Conversely, the Ninth Circuit's rejection of the District Court's analysis because the "only claimed neglect was counsel's addition of three days for service by mail to a time period running from docketing of an order or judgment," App. A-10, is directly at odds with *Pioneer's* requirement for application of an equitable balancing test to assess excusable neglect. Although in its Amended Opinion, the Ninth Circuit pays lip service to the Court's decision in *Pioneer*, the Amended Opinion clearly constitutes an attempt by the Ninth Circuit to retain its own "bright line" rule, a rule which was clearly rejected by the Court in *Pioneer*.

Under the Ninth Circuit's approach, the equitable analysis required by *Pioneer* can never be relevant if the

neglect is occasioned by misinterpretation of Local Rules of Court. Such a concept, however, is directly at odds with the admonition in *Pioneer* that an attorney's (or party's) neglect must be substantial to overcome the strong weight in favor of relief where all other factors "weigh *strongly* in favor of the tardy [motion]". *Pioneer, supra* at 1499 (emphasis added).

CONCLUSION

The Court has made it clear that a determination of "excusable neglect" is an equitable one taking into account all of the relevant circumstances and has rejected a "bright line" approach to such determinations. The District Court below, although without benefit of the decision in *Pioneer* at the time it issued its ruling, properly applied such a test to find excusable neglect present where the neglect resulted from a confusing reference contained in a Local Rule and no bad faith or prejudice to the opposing party or efficient judicial administration was present.

Unfortunately, the Ninth Circuit has inappropriately "distinguished" *Pioneer*, thereby breathing continuing life into its own "bright line" approach to excusable neglect - an approach fully at odds with this Court's ruling in *Pioneer*. Thus, the Court should grant review to insure that its excusable neglect standard is properly applied by inferior courts.

DATED: July 1, 1994

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PHYLLIS G. KYLE, *Plaintiff-Appellee,* v. CAMPBELL SOUP COMPANY, *Defendant-Appellant.*	No. 92-16826 D.C. No. CV-87-01612-MLS ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of California
Milton L. Schwartz, District Judge, Presiding

Argued and Submitted
November 5, 1993—San Francisco, California

Filed January 4, 1994
Amended April 8, 1994

Before: Arthur L. Alarcon, Edward Leavy and
Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Alarcon

SUMMARY

Civil Litigation/Motions/Attorneys and Judges

The court of appeals reversed a district court order granting time enlargement for filing of a motion and vacated an award of attorney fees. The court held that the district court abused its discretion by finding that a mistake of law constitutes excusable neglect under Fed. R. Civ. P. 6(b).

Appellee Phyllis Kyle sued appellant Campbell Soup Company, alleging sex discrimination. The district court found in her favor and awarded damages and injunctive relief. A local rule provided that post-trial motions for attorney fees must be filed within 30 days. Kyle filed a motion for fees but missed the deadline by two days because of her attorney's mistaken belief that an additional 3 days were permitted because the judgment had been served on Kyle by mail. On learning that the motion was not timely filed, Kyle filed a motion for enlargement of time, contending that her attorney's misinterpretation and misapplication of pertinent rules constituted excusable neglect under Rule 6(b). The district court granted the motion for time enlargement and rendered a fee award.

[1] The district court found that Kyle's counsel acted in good faith, that he did not demonstrate professional incompetence, and that Campbell Soup would not suffer prejudice if additional time was allowed. Although such factors might support a finding of excusable neglect in some other context, they did not suffice where the only claimed neglect was an attorney's addition of three days for service by mail to a time period running from docketing of an order or judgment. [2] The district court abused its discretion.

COUNSEL

Kimberley A. Worley, Littler, Mendelson, Fastiff & Tichy, Sacramento, California, for the defendant-appellant.

Larry C. Larsen, Law Offices of Gregory D. Thatch, Sacramento, California, for the plaintiff-appellee.

ORDER

The opinion filed January 4, 1994, is amended as follows: On page 37 of the slip opinion, add the following language prior to the last paragraph of the opinion:

Finally, we note that the Supreme Court's recent decision in *Pioneer Inv. Servs. v. Brunswick Assocs.*, 113 S. Ct. 1489 (1993), does not aid Kyle. In *Pioneer*, the Court concluded that where the notice given a party about a court-ordered filing deadline contains a " 'dramatic ambiguity' which could . . . confuse[ ] '[e]ven persons experienced in bankruptcy,' " it would be error to conclude that, absent prejudice to the other party, failure to comply with the deadline was not excusable neglect. *See id.* at 1494.

By contrast, counsel in this matter committed a mistake in interpreting and applying the Local Rules and Rule 6(e) of the Federal Rules of Civil Procedure, which were *not* ambiguous. *See* note 4, *supra*. This form of neglect was not excusable. Although the Court in *Pioneer* recognized that "excusable neglect" is a flexible, equitable concept, the Court also reminded us that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." *Pioneer*, 113 S. Ct. at 1496. In this case, counsel has not presented a persuasive justification for his misconstruction of nonambiguous rules. Accordingly, there is no basis for deviating from the general rule that a mistake of law does not constitute excusable neglect.

With this amendment, the court votes unanimously to deny the petition for rehearing.

Judge Leavy and Judge Kleinfeld vote to deny the suggestion for reconsideration en banc. Judge Alarcon recommends that the suggestion for rehearing en banc be denied.

OPINION

ALARCON, Circuit Judge:

Campbell Soup Company appeals from the district court's order granting Phyllis Kyle an enlargement of time to file her

motion for attorney's fees and the subsequent award of $50,446.75 in fees. We reverse the order granting the enlargement of time and the award of attorney's fees because the district court abused its discretion by finding that a mistake of law constitutes excusable neglect under Rule 6(b) of the Federal Rules of Civil Procedure.

I.

Factual and Procedural Background

On November 16, 1987, Phyllis Kyle filed suit against Campbell Soup Company, her employer, alleging sex discrimination in violation of Title VII and the California Fair Employment and Housing Act. She complained that she was assigned regular mechanic work and menial tasks instead of overhaul work that was performed by the man who previously held her position. Kyle asserted that she suffered "extreme humiliation, mental anguish, emotional distress and physical injury," amounting to one million dollars in damage. She also sought three million dollars in punitive damages and an injunction enjoining Campbell Soup from discriminating on the basis of sex.

Following a bench trial, the district court found that Campbell Soup discriminated against Kyle and awarded her $5,000.00 for emotional distress. The district court also ruled that Kyle was entitled to an injunction prohibiting sex-based discrimination. The court entered its final judgment on May 21, 1992, and served this judgment upon Kyle by mail.

Kyle was required under Local Rule 293(a) of the United States District Court for the Eastern District of California to file any post-trial motion for attorney's fees within 30 days after the entry of final judgment. E.D. Local R. 293(a). The 30-day deadline fell on Saturday, June 20, 1992. By operation of Federal Rule of Civil Procedure 6(a) extending deadline dates which fall on weekends to the first following weekday,

Kyle's deadline became Monday, June 22, 1992. *See* Fed. R. Civ. P. 6(a).[1] Instead, Kyle filed her motion for attorney's fees on Wednesday, June 24, 1992—two days after the deadline and 34 days after judgment had been entered.

After Campbell Soup's counsel phoned Kyle's attorney expressing an intent to oppose the attorney's fee motion on the basis that it was untimely, Kyle filed a motion for enlargement of the time to file the attorney's fee motion. Kyle's counsel explained that he had read Local Rule 293 and noticed that it referred to Local Rule 136, which states that "[t]he time periods fixed by these Local Rules shall be subject to FR Civ P 6(e)." E.D. Local R. 136. Under Federal Rule 6(e), three extra days to file motions are added "[w]henever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail." Fed. R. Civ. P. 6(e). Because the May 21, 1992 judgment had been served upon Kyle by mail, Kyle's counsel assumed that Rule 6(e) applied under the circumstances presented in this case. He mistakenly assumed that three extra days were to be added from Monday, June 22, 1992, his Rule 6(a) extended deadline, making his ultimate filing deadline Thursday, June 25, 1992. He thus believed that by filing on Wednesday, June 24, 1992, the motion was timely.

The district court concluded that Kyle's counsel had misinterpreted the Local Rules and misapplied Federal Rule of

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[1]Rule 6(a) states, in pertinent part:

> In computing any period of time prescribed or allowed . . . by the local rules of any district court . . . . [t]he last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days.

Civil Procedure 6(e), and that the motion was therefore untimely. Nevertheless, the district court granted Kyle's motion for time enlargement on the basis that these errors amounted to excusable neglect under Federal Rule of Civil Procedure 6(b).[2]

After reviewing materials submitted by the parties regarding the appropriate amount of fees, the district court awarded Kyle $50,446.75. Pursuant to 42 U.S.C. § 2000e-5(j) and 28 U.S.C. § 1291, Campbell Soup filed a timely appeal from the order enlarging the time and the award of attorney's fees.

II.

Discussion

The district court correctly concluded that Kyle's motion for attorney's fees was untimely. Local Rule 293(a) states that motions for attorney's fees must be filed "not later than thirty (30) days *after entry of final judgment.*" E.D. Local R. 293(a) (emphasis added). Local Rule 136(a) and Rule 6(e) of the Federal Rules of Civil Procedure only enlarge the filing time when the period for acting runs from the *service* of a notice by mail. Therefore, Local Rule 136(a) and Federal Rule of Civil Procedure 6(e) do not apply in this case. *See Hatchell v. United States*, 776 F.2d 244, 246 (9th Cir. 1985) (Rule 6(e) does not apply when the time for acting is designated from "the date of mailing" as opposed to "the service of notice" by

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[2]Rule 6(b) states:

> When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect ....

mail); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Kurtenbach*, 525 F.2d 1179, 1181 (8th Cir. 1975) (Rule 6(e) does not apply when the time for acting is designated from the "entry of judgment" as opposed to "the service of notice" by mail), *superseded on other grounds by* Fed. R. App. P. 4(a)(5). Pursuant to Rule 6(a) of the Federal Rules of Civil Procedure, Kyle's deadline for filing was Monday, June 22, 1992. Kyle did not file until Wednesday, June 24, 1992. Her motion for attorney's fees was therefore untimely.

We review a district court's finding of excusable neglect under Rule 6(b) for the untimely filing of a post-trial motion for abuse of discretion. *Davidson v. Keenan*, 740 F.2d 129, 132 (2d Cir. 1984). We must decide whether an attorney's mistake in adding three days for service by mail, under Federal Rule of Civil Procedure 6(e), to the time for a motion timed from "entry of final judgment" can amount to excusable neglect for purposes of allowing an enlargement of time.

The First Circuit resolved this issue in *Mattson v. Brown University*, 925 F.2d 529, 532 (1st Cir. 1991). In *Mattson*, the trial court allowed the defendant to add three extra days to its filing period and held that its motion for costs was timely. *Id.* The First Circuit, however, determined that the trial court erred in its ruling, noting that Rule 6(e) does not extend a time period running from entry of judgment. The court remanded the matter to the trial court "to consider whether defendant may have the benefit of Rule 6(b)(2)'s, 'excusable neglect,' " but held that "mistaken reliance on Rule 6(e) could *not* be excusable neglect." *Id.* (emphasis added). The court noted that "[s]uch a loose approach would open the gates." *Id.*[3]

Similarly, in this Circuit we have held that an attorney's

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[3]The district court in this matter refused to follow what it characterized as *Mattson*'s "point blank" holding that mistake of law regarding the applicability of Rule 6(e) could not constitute excusable neglect because it did not "happen to agree" with it.

mistaken belief that a notice of criminal appeal could be filed within 30 days did not constitute excusable neglect under Rule 4(b) of the Federal Rules of Appellate Procedure, even given the greater deference afforded to a district court's finding of excusable neglect in criminal cases. *United States v. Prairie Pharmacy, Inc.*, 921 F.2d 211, 213 (9th Cir. 1990); *see also Parke-Chapley Constr. Co. v. Cherrington*, 865 F.2d 907, 912-13 (7th Cir. 1989) (lack of familiarity or understanding of the Federal Rules, except in rare circumstances, is not excusable neglect; denial of enlargement of time under Federal Rule of Appellate Procedure 4(a) affirmed); *Townsel v. County of Contra Costa*, 820 F.2d 319, 320-21 (9th Cir. 1987) (ignorance of Rule 4(j) regarding time of service is not excusable neglect under Rule 6(b)); *Graham v. Pennsylvania R.R.*, 342 F.2d 914, 915-16 (D.C. Cir. 1964) (lack of awareness of a change in a federal rule is not excusable neglect under Rule 6(b)), *cert. denied*, 381 U.S. 904 (1965); *Diliberti v. United States*, 4 Cl. Ct. 505, 506-07 (1984) (mistaken belief that additional time was allotted for notice of appeal after service by mail is not excusable neglect).

Kyle cites *Skyywalker Records, Inc. v. Navarro*, 742 F. Supp. 638, 639 (S.D. Fla. 1990), and *Wei v. Hawaii*, 763 F.2d 370, 372 (9th Cir. 1985), in support of her contention that an attorney's mistake of law is excusable neglect. In *Skyywalker*, the district court granted a motion for enlargement of time to file a motion for costs on the basis that counsel "failed to appreciate" the 30-day limitation provided by the local rule involved. *Skyywalker*, 742 F. Supp. at 639. The court did not elaborate on what was meant by "failure to appreciate" or why counsel's mistake constituted "excusable neglect" under Rule 6(b).

Kyle's reliance upon *Wei* is also misplaced. We held in *Wei* that an attorney's inadvertence does not qualify as good cause under Federal Rule of Civil Procedure 4(j) for failure to comply with the requirements for service of process. *Wei*, 763 F.2d at 372. Thus, *Wei* supports our conclusion that the dis-

trict court erred in the instant matter in concluding that an attorney's mistaken application of Rule 6(e) can excuse compliance with time limitations.

Kyle also attempts to support the district court's finding of excusable neglect by citing its application of some of the factors outlined by the Third Circuit in *Dominic v. Hess Oil V.I. Corp*, 841 F.2d 513, 517 (3d Cir. 1988), for determining when excusable neglect has occurred. In *Dominic*, the district court excused the plaintiff's failure to comply with service of process requirements because of "confusion in the law over how to assert properly a claim over a third party defendant."[4] *Id.* at 515. Reviewing this holding, the Third Circuit enumerated "factors which are relevant to the evaluation of whether excusable neglect has occurred":

> 1) whether the inadvertence reflected professional incompetence such as ignorance of rules of procedure, 2) whether an asserted inadvertence reflects an easily manufactured excuse incapable of verification by the court, 3) counsel's failure to provide for a readily foreseeable consequence, 4) a complete lack of diligence . . .[,] 5) whether the inadvertence resulted despite counsel's substantial good faith

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[4]This can be contrasted with the "confusion" involved in this case. Here, the confusion is attributable to counsel's misunderstanding and misapplication of the Local Rules and the Federal Rules of Civil Procedure. There is nothing confusing about the rules themselves. Local Rule 293(a) clearly states that a motion for attorney's fees must be filed "not later than thirty (30) days after entry of final judgment." E.D. Local R. 293(a). Local Rule 293(a) also refers to Local Rules 230 and 136, however these references are not confusing. Local Rule 230 does not address the timely filing of motions. Local Rule 136(a) adopts Federal Rule of Civil Procedure 6(e) providing three additional days for acting when the time allowed to act is within a prescribed period after service by mail. E.D. Local R. 136(a); Fed. R. Civ. P. 6(e). Local Rule 293(a) plainly states that the time for filing a motion for attorney's fees is 30 days after the entry of judgment. Therefore, Local Rule 136 and Federal Rule of Civil Procedure 6(e) do not apply to extend the filing period.

> efforts towards compliance. . . . [or 6)] whether the enlargement of time will prejudice the opposing party.

Id. at 517. The court concluded that none of the factors listed above militated against a finding of excusable neglect in *Dominic* and held that the district court had not abused its discretion in excusing the incomplete service. *Id.* at 517.

[1] In this case, the district court found that counsel acted in good faith, that he had not demonstrated professional incompetence, and that Campbell Soup would not be prejudiced by allowing the time enlargement. Although these factors might support a finding of excusable neglect in a case involving different facts, we hold that they do not suffice where the only claimed neglect is an attorney's addition of three days for service by mail to a time period running from docketing of an order or judgment.

Finally, we note that the Supreme Court's recent decision in *Pioneer Inv. Servs. v. Brunswick Assocs.*, 113 S. Ct. 1489 (1993), does not aid Kyle. In *Pioneer*, the Court concluded that where the notice given a party about a court-ordered filing deadline contains a " 'dramatic ambiguity' which could . . . confuse[ ] '[e]ven persons experienced in bankruptcy,' " it would be error to conclude that, absent prejudice to the other party, failure to comply with the deadline was not excusable neglect. *See id.* at 1494.

By contrast, counsel in this matter committed a mistake in interpreting and applying the Local Rules and Rule 6(e) of the Federal Rules of Civil Procedure, which were *not* ambiguous. *See* note 4, *supra*. This form of neglect was not excusable. Although the Court in *Pioneer* recognized that "excusable neglect" is a flexible, equitable concept, the Court also reminded us that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." *Pioneer*, 113 S. Ct. at 1496. In this case, coun-

sel has not presented a persuasive justification for his misconstruction of nonambiguous rules. Accordingly, there is no basis for deviating from the general rule that a mistake of law does not constitute excusable neglect.

[2] We conclude that the district court abused its discretion by finding that mistaken reliance upon Rule 6(e) amounted to excusable neglect in this matter. Accordingly, we REVERSE the order granting the time enlargement and VACATE the award of attorney's fees.

APPENDIX B
FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PHYLLIS G. KYLE, *Plaintiff-Appellee,* v. CAMPBELL SOUP COMPANY, *Defendant-Appellant.*	No. 92-16826 D.C. No. CV-87-01612-MLS OPINION

Appeal from the United States District Court
for the Eastern District of California
Milton L. Schwartz, District Judge, Presiding

Argued and Submitted
November 5, 1993 – San Francisco, California

Filed January 4, 1994

Before: Arthur L. Alarcón, Edward Leavy and
Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Alarcon

SUMMARY

Civil Litigation/Motions/Attorneys and Judges

The court of appeals reversed a district court order granting time enlargement for filing of a motion and vacated an award of attorney fees. The court held that the

district court abused its discretion by finding that a mistake of law constitutes excusable neglect under Fed.R. Civ. P. 6(b).

Appellee Phyllis Kyle sued appellant Campbell Soup Company, alleging sex discrimination. The district court found in her favor and awarded damages and injunctive relief. A local rule provided that post-trial motions for attorney fees must be filed within 30 days. Kyle filed a motion for fees but missed the deadline by two days because of her attorney's mistaken belief that an additional 3 days were permitted because the judgment had been served on Kyle by mail. On learning that the motion was not timely filed, Kyle filed a motion for enlargement of time, contending that her attorney's misinterpretation and misapplication of pertinent rules constituted excusable neglect under Rule 6(b). The district court granted the motion for time enlargement and rendered a fee award.

[1] The district court found that Kyle's counsel acted in good faith, that he did not demonstrate professional incompetence, and that Campbell Soup would not suffer prejudice if additional time was allowed. Although such factors might support a finding of excusable neglect in some other context, they did not suffice where the only claimed neglect was an attorney's addition of three days for service by mail to a time period running from docketing of an order or judgment. [2] The district court abused its discretion.

COUNSEL

Kimberley A. Worley, Littler, Mendelson, Fastiff & Tichy, Sacramento, California, for the defendant-appellant.

Larry C. Larsen, Law Offices of Gregory D. Thatch, Sacramento, California, for the plaintiff-appellee.

OPINION

ALARCON, Circuit Judge:

Campbell Soup Company appeals from the district court's order granting Phyllis Kyle an enlargement of time to file her motion for attorney's fees and the subsequent award of $50,446.75 in fees. We reverse the order granting the enlargement of time and the award of attorney's fees because the district court abused its discretion by finding that a mistake of law constitutes excusable neglect under Rule 6(b) of the Federal Rules of Civil Procedure.

I.

Factual and Procedural Background

On November 16, 1987, Phyllis Kyle filed suit against Campbell Soup Company, her employer, alleging sex discrimination in violation of Title VII and the California Fair Employment and Housing Act. She complained that she was assigned regular mechanic work and menial tasks instead of overhaul work that was performed by the man who previously held her position. Kyle asserted that

she suffered "extreme humiliation, mental anguish, emotional distress and physical injury," amounting to one million dollars in damage. She also sought three million dollars in punitive damages and an injunction enjoining Campbell Soup from discriminating on the basis of sex.

Following a bench trial, the district court found that Campbell Soup discriminated against Kyle and awarded her $5,000.00 for emotional distress. The district court also ruled that Kyle was entitled to an injunction prohibiting sex-based discrimination. The court entered its final judgment on May 21, 1992, and served this judgment upon Kyle by mail.

Kyle was required under Local Rule 293(a) of the United States District Court for the Eastern District of California to file any post-trial motion for attorney's fees within 30 days after the entry of final judgment. E.D. Local R. 293(a). The 30-day deadline fell on Saturday, June, 20, 1992. By operation of Federal Rule of Civil Procedure 6(a) extending deadline dates which fall on weekends to the first following weekday, Kyle's deadline became Monday, June 22, 1992. *See* Fed. R. Civ. P. 6(a).[1]

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[1] Rule 6(a) states, in pertinent part:

> In computing any period of time prescribed or allowed . . . by the local rules of any district court. . . . [t]he last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days.

Instead, Kyle filed her motion for attorney's fees on Wednesday, June 24, 1992 – two days after the deadline and 34 days after judgment had been entered.

After Campbell Soup's counsel phoned Kyle's attorney expressing an intent to oppose the attorney's fee motion on the basis that it was untimely, Kyle filed a motion for enlargement of the time to file the attorney's fee motion. Kyle's counsel explained that he had read Local Rule 293 and noticed that it referred to Local Rule 136, which states that "[t]he time periods fixed by these Local Rules shall be subject to FR Civ P 6(e)." E.D. Local Rule R. 136. Under Federal Rule 6(e), three extra days to file motions are added "[w]henever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail." Fed. R. Civ. P. 6(e). Because the May 21, 1992 judgment had been served upon Kyle by mail, Kyle's counsel assumed that Rule 6(e) applied under the circumstances presented in this case. He mistakenly assumed that three extra days were to be added from Monday, June 22, 1992, his Rule 6(a) extended deadline, making his ultimate filing deadline Thursday, June 25, 1992. He thus believed that by filing on Wednesday, June 24, 1992, the motion was timely.

The district court concluded that Kyle's counsel had misinterpreted the Local Rules and misapplied Federal Rule of Civil Procedure 6(e), and that the motion was therefore untimely. Nevertheless, the district court granted Kyle's motion for time enlargement on the basis

that these errors amounted to excusable neglect under Federal Rule of Civil Procedure 6(b).[2]

After reviewing materials submitted by the parties regarding the appropriate amount of fees, the district court awarded Kyle $50,446.75. Pursuant to 42 U.S.C. § 2000e-5(j) and 28 U.S.C. § 1291, Campbell Soup filed a timely appeal from the order enlarging the time and the award of attorney's fees.

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The district court correctly concluded that Kyle's motion for attorney's fees was untimely. Local Rule 293(a) states that motions for attorney's fees must be filed "not later than thirty (30) days *after entry of final judgment.*" E.D. Local R. 293(a) (emphasis added). Local Rule 136(a) and Rule 6(e) of the Federal Rules of Civil Procedure only enlarge the filing time when the period for acting runs from the *service* of a notice by mail. Therefore, Local Rule 136(a) and Federal Rule of Civil Procedure 6(e) do not

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[2] Rule 6(b) states:

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apply in this case. *See Hatchell v. United States*, 776 F.2d 244, 246 (9th Cir. 1985) (Rule 6(e) does not apply when the time for acting is designated from "the date of mailing" as opposed to "the service of notice" by mail); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Kurtenbach*, 525 F.2d 1179, 1181 (8th Cir. 1975) (Rule 6(e) does not apply when the time for acting is designated from the "entry of judgment" as opposed to "the service of notice" by mail), *superseded on other grounds by* Fed. R. App. P. 4(a)(5). Pursuant to Rule 6(a) of the Federal Rules of Civil Procedure, Kyle's deadline for filing was Monday, June 22, 1992. Kyle did not file until Wednesday, June 24, 1992. Her motion for attorney's fees was therefore untimely.

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The First Circuit resolved this issue in *Mattson v. Brown University*, 925 F.2d 529, 532 (1st Cir. 1991). In *Mattson*, the trial court allowed the defendant to add three extra days to its filing period and held that its motion for costs was timely. *Id.* The First Circuit, however, determined that the trial court erred in its ruling, noting that Rule 6(e) does not extend a time period running from entry of judgment. The court remanded the matter to the trial court "to consider whether defendant may have the benefit of Rule 6(b)(2)'s, 'excusable neglect,'" but held that "mistaken reliance on Rule 6(e) could

not be excusable neglect." *Id.* (emphasis added). The court noted that "[s]uch a loose approach would open the gates." *Id.*[3]

Similarly, in this Circuit we have held that an attorney's mistaken belief that a notice of criminal appeal could be filed within 30 days did not constitute excusable neglect under Rule 4(b) of the Federal Rules of Appellate Procedure, even given the greater deference afforded to a district court's finding of excusable neglect in criminal cases. *United States v. Prairie Pharmacy, Inc.*, 921 F.2d 211, 213 (9th Cir. 1990); *see also Parke-Chapley Constr. Co. v. Cherrington*, 865 F.2d 907, 912-13 (7th Cir. 1989) (lack of familiarity or understanding of the Federal Rules, except in rare circumstances, is not excusable neglect; denial of enlargement of time under Federal Rule of Appellate Procedure 4(a) affirmed); *Townsel v. County of Contra Costa*, 820 F.2d 319, 320-21 (9th Cir. 1987) (ignorance of Rule 4(j) regarding time of service is not excusable neglect under Rule 6(b)); *Graham v. Pennsylvania R.R.*, 342 F.2d 914, 915-16 (D.C. Cir. 1964) (lack of awareness of a change in a federal rule is not excusable neglect under Rule 6(b)), *cert. denied* 381 U.S 904 (1965); *Diliberti v. United States*, 4 Cl. Ct. 505, 506-07 (1984) (mistaken belief that additional time was allotted for notice of appeal after service by mail is not excusable neglect).

Kyle cites *Skyywalker Records, Inc. v. Navarro*, 742 F. Supp. 638, 639 (S.D. Fla. 1990), and *Wei v. Hawaii*, 763 F.2d

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[3] The district court in this matter refused to follow what it characterized as *Mattson*'s "point blank" holding that mistake of law regarding the applicability of Rule 6(e) could not constitute excusable neglect because it did not "happen to agree" with it.

370, 372 (9th Cir. 1985), in support of her contention that an attorney's mistake of law is excusable neglect. In *Skyywalker*, the district court granted a motion for enlargement of time to file a motion for costs on the basis that counsel "failed to appreciate" the 30-day limitation provided by the local rule involved. *Skyywalker*, 742 F.2d Supp. at 639. The court did not elaborate on what was meant by "failure to appreciate" or why counsel's mistake constituted "excusable neglect" under Rule 6(b).

Kyle's reliance upon *Wei* is also misplaced. We held in *Wei* that an attorney's inadvertence does not qualify as good cause under Federal Rule of Civil Procedure 4(j) for failure to comply with the requirements for service of process. *Wei*, 763 F.2d at 372. Thus, *Wei* supports our conclusion that the district court erred in the instant matter in concluding that an attorney's mistaken application of Rule 6(e) can excuse compliance with time limitations.

Kyle also attempts to support the district court's finding of excusable neglect by citing its application of some of the factors outlined by the Third Circuit in *Dominic v. Hess Oil V.I Corp*, 841 F.2d 513, 517 (3d Cir. 1988), for determining when excusable neglect has occurred. In *Dominic*, the district court excused the plaintiff's failure to comply with service of process requirements because of "confusion in the law over how to assert properly a claim over a third party defendant."[4] *Id.*

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[4] This can be contrasted with the "confusion" involved in this case. Here, the confusion is attributable to counsel's misunderstanding and misapplication of the Local Rules and the Federal Rules of Civil Procedure. There is nothing confusing about

at 515. Reviewing this holding, the Third Circuit enumerated "factors which are relevant to the evaluation of whether excusable neglect has occurred":

> 1) whether the inadvertence reflected professional incompetence such as ignorance of rules of procedure, 2) whether an asserted inadvertence reflects an easily manufactured excuse incapable of verification by the court, 3) counsel's failure to provide for a readily foreseeable consequence, 4) a complete lack of diligence . . . [,] 5) whether the inadvertence resulted despite counsel's substantial good faith efforts towards compliance. . . . [or 6)] whether the enlargement of time will prejudice the opposing party.

Id. at 517. The court concluded that none of the factors listed above militated against a finding of excusable neglect in *Dominic* and held that the district court had not abused its discretion in excusing the incomplete service. *Id.* at 517.

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the rules themselves. Local Rule 293(a) clearly states that a motion for attorney's fees must be filed "not later than thirty (30) days after entry of final judgment." E.D. Local R. 293(a). Local Rule 293(a) also refers to Local Rules 230 and 136, however these references are not confusing. Local Rule 230 does not address the timely filing of motions. Local Rule 136(a) adopts Federal Rule of Civil Procedure 6(e) providing three additional days for acting when the time allowed to act is within a prescribed period after service by mail. E.D. Local R. 136(a); Fed. R. Civ. P. 6(e) Local Rule 293(a) plainly states that the time for filing a motion for attorney's fees is 30 days after the entry of judgment. Therefore, Local Rule 136 and Federal Rule of Civil Procedure 6(e) do not apply to extend the filing period.

[1] In this case, the district court found that counsel acted in good faith, that he had not demonstrated professional incompetence, and that Campbell Soup would not be prejudiced by allowing the time enlargement. Although these factors might support a finding of excusable neglect in a case involving different facts, we hold that they do not suffice where the only claimed neglect is an attorney's addition of three days for service by mail to a time period running from docketing of an order or judgment.

[2] We conclude that the district court abused its discretion by finding that mistaken reliance upon Rule 6(e) amounted to excusable neglect in this matter. Accordingly, we REVERSE the order granting the time enlargement and VACATE the award of attorney's fees.

APPENDIX C

LAW OFFICES OF GREGORY D. THATCH
Larry C. Larsen, State Bar No. 88944
1730 I Street, Suite #220
Sacramento, California 95814
(916) 443-6956

Attorneys for Plaintiff
PHYLLIS G. KYLE

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE EASTERN DISTRICT

PHYLLIS G. KYLE, Plaintiff, vs. CAMPBELL SOUP COMPANY Defendant. _____/	CASE NO. CIVS-87-1612-MLS-JFM ORDER AFTER HEARING REGARDING DEFENDANT'S MOTION OPPOSING THE TAXING OF COSTS AND PLAINTIFF'S MOTION FOR ENLARGEMENT OF TIME TO FILE MOTION FOR ATTORNEYS' FEES Date: August 14, 1992 Time: 9:00 Ctrm: 7 (Filed Sep. 21, 1992)

This matter came on for hearing on August 14, 1992, in the above-entitled court on the separate motions of Defendant opposing the taxing of costs, and Plaintiff, for enlargement of time to file Plaintiff's Motion for Attorneys' Fees.

Plaintiff was represented by Larry C. Larsen of the Law Offices of Gregory D. Thatch and Defendant was

represented by Kimberley A. Worley, of the law firm of Littler, Mendelson, Fastiff & Tichy.

After hearing argument from counsel, the Court announced its disposition on the Motions and its reasons therefor into the record and ordered Plaintiff to prepare a formal order consisted therewith.

The Court thereupon ordered that Defendants' Motion opposing the taxing of costs was denied with respect to subpena [sic] fees for trial witness who did not testify and with respect to deposition transcripts of witnesses who did not testify. The Court ordered that Defendants' Motion was granted with respect to per diem charges of court reporters. Plaintiff's Motion for Enlargement of Time to file her Motion for Attorneys' Fees was granted. Defendants' Motion was denied in part and granted in part as herein stated and Plaintiff's Motion was granted for the reasons set forth in the transcript attached hereto.

IT IS SO ORDERED

Dated: September 21, 1992,

/s/ Milton L. Schwartz
Milton L. Schwartz, United States District Judge

PROOF OF SERVICE BY HAND DELIVERY
CCP 1013 (a), 2015.5

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

I, the undersigned, declare:

I am a citizen of the United States and resident of the County of Sacramento. I am over the age of eighteen years and not a party to the within action. My business address is 1730 I Street, Suite #220, Sacramento, California 95814.

I personally served, by hand delivery, the following document:

ORDER AFTER HEARING REGARDING DEFENDANT'S MOTION OPPOSING THE TAXING OF COSTS AND PLAINTIFF'S MOTION FOR ENLARGEMENT OF TIME TO FILE MOTION FOR ATTORNEYS' FEES

in the following manner:

Prior to 5:00 p.m. on September 4, 1992, I hand delivered a true copy of said document(s) to the following:

Kimberley A. Worley

at LITTLER, MENDELSON, FASTIFF & TICHY, 400 Capitol Mall, 16th Floor, Sacramento, CA 95814.

I declare under penalty of perjury that the foregoing is true and correct, under the laws of the State of California and that this Declaration was executed on September 4, 1992, at Sacramento, California.

/s/Larry C. Larsen
LARRY C. LARSEN

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE EASTERN
DISTRICT OF CALIFORNIA

PHYLLIS G. KYLE, Plaintiff, Vs. CAMPBELL SOUP CO., Defendant,	CASE NO: CIV-S-87-1612 (Filed Sept. 4, 1992)

REPORTER'S TRANSCRIPT OF JUDGE'S RULING ON MOTION OPPOSING THE TAXING OF COSTS AND PLAINTIFF'S MOTION FOR ENLARGEMENT OF TIME TO FILE MOTION FOR ATTORNEY'S FEES

Held in the United States District Court, In and for the Eastern District of California, Friday, August 14th, 1992, beginning at 9:00 a.m.

Before the

Honorable MILTON L. SCHWARTZ, Judge thereof

Reported by: Catherine F. Bodene, CSR No. 6926

APPEARANCES

FOR THE DEFENDANT:

LITTLER, MENDELSON, FASTIFF & TICHY
A Professional Corporation
400 Capitol Mall, 16th Floor
Sacramento, California 95814-4410
BY: KIMBERLEY A. WORLEY,
Attorney At Law

FOR THE PLAINTIFF:

LAW OFFICES OF GREGORY D. THATCH
1730 I Street, Suite 220
Sacramento, California 95814
BY: LARRY C. LARSEN,
Attorney At Law

SACRAMENTO, CALIFORNIA, FRIDAY, AUGUST 14TH, 1992

(On the record at 9:00 a.m.)

THE COURT: This is the Court's decision on the two motions before it. One – Defendant's motion, rather, objects to taxing of costs. The other one is Plaintiff's motion for enlargement of time. Let me preface with respect to the latter, one comment that – because I'm going to ask for a transcript of what I say to attach to the order as the basis for it.

Your analogy, Miss Worley, to the rule on the time for taking an appeal, which you talk about with respect to enforcing the rule for timeliness and not waiver or not finding an exclusion, that's a good argument on it's face, but I don't agree with it. And I will tell you why. There are two reasons why I think it is not truly an analogous situation.

An appeal, in the first place, is usually the jurisdictional time or at least a mandatory statutory time for taking an appeal. And it has traditionally been that. And it's based upon the concept that there has to be an end at some point to litigation and get on with our lives and so forth.

When you're talking about an appeal, the parties have had their day in court. They have litigated their cases, and they have gotten a decision. And there are some kinds of cases where there is no appeal available. Not very often, but occasionally.

An appeal is a – is part of the system. But the parties have had their day in court. And if a Court could always waive the failure to file a timely Notice of Appeal, there would essentially never be any end to litigation because the winning party would always know at some future date the losing party might come in and say I'm sorry but I was sick and all kinds of things, and now it's two years later but we want to take an appeal. There has got to be some finality, and that's the real reason for it.

In an attorney's fees application that isn't true. The parties have not had any day in court, and the question of the determination on post-judgment has nothing to do with the judgment that becomes final with post-judgment application for attorney's fees. They've never had an opportunity to address it and there is a difference in that context.

What we're asking here is, and we're hung up on one thing. We're hung up. We get down to one essential point in this Court's judgment, and that is whether or not under the circumstances of this case the Plaintiff should be excused for lack of timeliness.

Now, there is a good thing and a bad thing to be said about that from the Plaintiff's point of view. And this is the thing that hung me up for a long time, Mr. Larsen. It was a very foolish thing to do in some respects, to look at the rule as you say you did, and I'm sure you did, and

say that you had 30 days from the entry of judgment within which to file your motion. And I alerted everybody to that in the decision that I wrote so that there would be no misunderstanding. And I cited the rule.

It doesn't take a lot of time. People are busy, but it doesn't take all that much time to get a motion for attorney's fees on file. And if you are having time problems, you can always ask for permission to supplement with the detail if you have to go through and get the time records and all those kinds of things. But it's the motion that has to be filed timely.

It doesn't show very good judgment to say "Well, I think I've got three extra days, and I think that is the right result, and so I'm going to use it." "I'm going to use two of them." Usually you don't see careful lawyers, like you people are, doing that.

When it says 30 days from the entry of judgment, you're going to file it 30 days from entry of judgment even though you think you might have three more days because this three-day thing is a nightmare for everybody and causes all kinds of problems. That's the bad side of looking at what you did.

The good side of it is is that I have to agree with you, it is confusing, and it is difficult, and it can be argued the other way. And I have to acknowledge that putting in the reference to Rule 136 tends to confuse rather than help maybe. And I'm surprised that Miss Worley came up with a case that seemed to say point blank this isn't good enough, a misunderstanding of Rule 6 or 6(e) isn't enough.

And I don't happen to agree with, that with the circumstances of this case. And anyway, the facts of this case depend on our Local Rule. And we know how it is worded. And my conclusion, and I have to call it one way or the other and it's very close, is that I cannot say that this was inexcusable neglect or real negligence or real carelessness or anything like that.

I think that there was – it was not unreasonable to take the position that Plaintiff's counsel did. I think it was dangerous, and I'm surprised that you did it. But I cannot say that it was unreasonable to rely upon your interpretation in the law in doing so. And that's really after going back and focusing on all these different issues, that's where I came down. This is the Court's decision, and I will be asking you, Mr. Larsen, to get – arrange with the reporter for a copy of what I'm saying to attach to an order which simply recites what I'm about to order so that you can, in effect, what it says is you recite the order very briefly, then say for the reasons upon the grounds set forth in the transcript attached so that it can be physically appended.

On May 21, 1992, this court entered judgment in favor of Plaintiff in this employment discrimination action. The case is now before the Court on Defendant's motion opposing taxation of costs and on Plaintiff's motion to enlarge time to file motion for attorney's fees.

In its motion opposing costs, Defendant objects to the award of the following: (1) subpoena fees for trial witnesses Larry Davis, Sue Christiansen and Dominic Giglini; (2) deposition costs for Edyth Lybrand, Michael Andrade, and David Schaffer; and (3) per diem charges of

the court reporter for depositions taken by Plaintiff. Federal Rule of Civil Procedure 54(d) provides that the costs may be award to the prevailing party. The Court has discretion to award those costs listed at 28 U.S.C. section 1920. *Crawford Fitting Co. V. J.T. Gibbons, Inc.*, 482 U.S. 437, (1987). There is a presumption in favor of awarding costs. *Horning V. Washoe County*, 108 Federal Rule Decision 364, District of Nevada (1985). Although Defendant argues that subpoena fees for non-testifying witnesses are non-recoverable, such fees are properly taxed as, quote, "fees of the clerk and marshall", end quote, as provided by 28 U.S.C. section 1920(1). Section 1920(1) – that's not – section 1920(1) includes fees of a private process server. *Alfex Corp. V. Underwriters Laboratories, Inc.*, 914 F.2d 175 (9th Cir. 1990). Accordingly the Court is satisfied that the award of subpoena fees for non-testifying witnesses is ordinarily proper.

Defendant also argues that the subpoena for Larry Davis was ineffective pursuant to Federal Rule of Civil Procedure 45(b)(2), and that all three subpoenas were ineffective because they were not accompanied or may not have been accompanied by witness fees and mileage as required by Federal Rule of Civil Procedure 45(b)(1). The Court has examined counsel for Plaintiff with respect to this, and counsel for Plaintiff has today assured the Court and opposing counseling [sic] in open court that he has, in fact, tendered the witness fees and did, in fact, tender the fees to the subpoenaed witnesses at the time they were served, and the Court accepts that representation.

Defendant next argues that the deposition costs for Edyth Lybrand, Michael Andrade, and David Schaffer are

not recoverable because none of these witnesses testified at trial, and their depositions were taken apparently only for Plaintiff's investigative purposes. Prevailing parties are entitled to recover costs of original depositions and copies under section 1920(2) of Title 28 U.S.C. provided they were, quote, "necessarily obtained for use in the case", unquote. According to Plaintiff, these depositions were necessary because Plaintiff had no other means to obtain potential testimony from these witnesses. The defendant offers no evidence that the depositions were merely investigative, nor does Defendant object that the depositions were improperly taken or unduly prolonged. *George R. Hall, Inc. V. Superior Trucking*, 532 F. Supp. 985 (Northern District of Georgia, 1982). Defendant has been unable to show circumstances which in this Court's opinion are sufficient to overcome the presumption in favor of awarding Plaintiff the costs of these depositions. Accordingly, Defendant's motion regarding these costs will be denied.

Finally, Defendant objects to the cost of the court reporter's per diem charge for the taking of the depositions of Edyth Lybrand, Don Ramsey, David Schaffer, Mune Takeoka, Michael Andrade, James P. Gardner, Robert E. Rains, and Robert W. Inpyn. The court reporter's per diem charge may or may not be a taxable cost, but it is not specifically delineated under 28 U.S.C. section 1920. The case that – really the only case that the Court's attention has been called to or that it has found that seems to bear on this specific question is the *Viacao Aerea Sao Paulo V. Int'l Lease Finance Corp.*, 1 – I'm sorry – 199 Federal Rules Decision 435 (Central District of California, 1988), disapproved on other grounds in *Aflex Corp.*

V. Underwriters Laboratories, Inc., 914 F.2d, 175 (9th Circuit 1990). Admittedly, that case is less than 100 percent satisfactory for anything on the question that we're dealing with, but as the Court reads it, it is a decision by a sound and able judge in this circuit that the Court respects, and it seems to address the question in accordance with the conclusions that have been drawn by Defendant. And the Court has decided to adopt the reasoning that it believes is applicable in that case even though it agrees with Plaintiff that it has never heard of this question having been raised before, and it never has been raised in my presence and my Court as a lawyer or a judge, but that doesn't mean it isn't right. Accordingly, Defendant's motion opposing the taxing of costs for court reporter per diem charges will be granted.

The Court now turns to Plaintiff's application for enlargement of time to file her motion for attorney's fees. Plaintiff's motion rests on Defendant's intended timeliness objection to Plaintiff's attorney's fees motions, which was filed June 24, 1992. The notice of entry of judgment was issued May 21, 1992. Under Local Rule 293(a), Plaintiff was required to file her fees motion within 30 days after entry of judgment. Before deciding whether to grant enlargement, the Court must determine whether Plaintiff's fees motion is timely. As noted, Local Rule 293(a) requires motions to be filed, quote, "not later than 30 days after entry of final judgment", unquote. The Court entered judgment in this action on May 21, 1992. The 30th day after entry of judgment was Saturday, June 20th, 1992, and by operation of Federal Rule of Civil Procedure 6(a), Plaintiff's deadline became Monday, June 22nd, 1992. Plaintiff insists that she is entitled to the three-day

extension provided by Rule 6, Federal Rule of Civil Procedure 6(e), and by Local Rule 136 because notice of entry of judgment was served by mail.

Federal Rule 6(e) allows a three-day extension for service by mail, quote, "whenever a party has the right or is required to do some act or take some proceeding within a prescribed period after the service of the notice or other paper", unquote. Rule 6(e) applies only when action must be taken after service. *Hatchell V. United States*, 776 F.2d 244 (9th Circuit 1985). Here, Plaintiff was required to act within 30 days after entry of judgment, not from service of notice of entry of judgment. Thus, she is not entitled to a Rule 6(e) extension, and her motion for fees was due on Monday, June 22, 1992. Plaintiff did not file her motion until Wednesday, June 24, two days late.

To overcome her untimely filing, Plaintiff requests the Court enlarge her time to file. Federal Rule 6(b)(2) gives the Court discretion to enlarge Plaintiff's time to file her motion for fees if she can show that her failure to act in a timely fashion was the result of excusable neglect. In making this determination, the Court considers, among other things, whether th untimely filing resulted from professional incompetence or was a good faith effort to comply with the rules. Also relevant is prejudice to the party opposing enlargement. *Dominic V. Hess Oil* – I'm sorry. *Dominic V. Hess Oil*, 841 F.2d 513 (3rd Circuit 1988).

The Court has determined that Plaintiff's action here amounts to excusable neglect. First, counsel's misapplication of Rule 6(e)'s three-day extension is not the kind of mistake that reflects professional incompetence. Instead,

after reading the pertinent local and federal rules, the Court has concluded that Plaintiff made a good faith effort to comply with those rules. Second, Defendant was not prejudiced by Plaintiff's neglect. As Plaintiff notes, hearing on the motion would not have been set for an earlier date had she filed her motion on time – I'm sorry – had she filed her motion on time, and Defendant had more than the required 31 days, in any event, to file a response.

Finally, if Plaintiff's neglect is not excusable, then Plaintiff may forfeit an award of fees to which she may otherwise be entitled. Accordingly, Plaintiff's motion for enlargement, in this Court's judgment, should be granted on the ground that Plaintiff's two-day neglect is excusable.

For the reasons just stated, Defendant's motion opposing taxation of costs for subpoena fees is denied. Defendant's motion is denied as to the deposition costs, and Defendant's motion is granted as to costs for the court reporters' per diem claims. Plaintiff's motion to enlarge time is granted.

Will you prepare an order that recites these orders and provisions, Mr. Larsen, and then attach a transcript from the court reporter.

And this is not part of the decision, but I should explain to the reporter that when I said that the Court reporter's per diem fees were denied, does not mean she can't charge them, just means they can't be passed on to the opposing party.

Anything else?

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SACRAMENTO)

I, Catherine F. Bodene certify that I was the official court reporter and that I reported in shorthand writing the foregoing proceedings; that I thereafter caused my shorthand writing to be reduced to typewriting, and the pages numbered 3 through 13 inclusive, constitute a full, true, and correct record of said proceedings:

COURT: UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF CALIF.

JUDGE: HONORABLE
MILTON L. SCHWARTZ

CAUSE: PHYLLIS G. KYLE V. CAMPBELL
SOUP CO.,
CASE NO: CIV-S-87-1612

DATE: FRIDAY, AUGUST 14th, 1992.

IN WITNESS WHEREOF, I have subscribed this certificate at Sacramento, California, on this 2nd day of September, 1992.

/s/ Catherine F. Bodene
CATHERINE F. BODENE
CSR NO. 6926